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April 5, 1996

Federal Election Commission
Mary L. Taksar, Esq.
Central Enforcement Docket
General Counsel's Office
999 E Street, NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
APR 5 11 12 AM '96

Re: MUR 4305
Response to Complaint

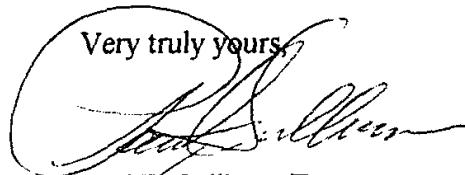
Dear Ms. Taskar:

Enclosed please find the response in the above-referenced matter from Malcolm S. Forbes, Jr. In addition, please find the Statement of Designation of Counsel appointing me to represent him in this matter.

I am also seeking a formal extension of time up until today, April 5, 1996, by which to have the enclosed document being timely filed on behalf of Respondent. Delays in this matter were encountered in attempting to coordinate amongst the various parties involved, given the wind-down for Mr. Forbes' presidential campaign which has now terminated.

Thank you for time and attention to this matter. If you have any further questions, please contact me at my Washington-based business office at (202) 682-4725.

Very truly yours,



Paul E. Sullivan, Esq.
Counsel to Respondent

w/enclosure

BEFORE THE FEDERAL ELECTION COMMISSION

IN RE: Malcolm S. Forbes, Jr.)
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MUR 4305 Response

In accordance with 2 U.S.C. §437g(a)(1), Malcolm S. Forbes, Jr. ("Respondent"), an individual, proffers this response to the complaint filed by Charles J. Givens ("Complainant") and identified by the Federal Election Commission ("FEC" or "Commission") as MUR 4305.

For the reasons stated below, Respondent submits that the Complainant has failed to state a cause of action which is in violation of the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), and as such, the Commission should make a finding of No Reason to Believe and close this matter.

A. SUMMARY OF COMPLAINT

The basis of the Complaint consists of an allegation that Mr. Forbes, who was a candidate for the Republican nomination for President of the United States, attempted to influence the course of his campaign by the editorials which he wrote in *Forbes* magazine under the title of "Fact and Comment." Complainant attached a variety of these "Fact and Comment" articles alleging that they specifically influenced the presidential campaign of Mr. Forbes in violation of the Act.

Complainant alleges that the editorial comments constituted a corporate contribution to a candidate in violation of the Act¹, and the corresponding Federal Election Regulations. Complainant also

¹ Complainant improperly cites to §431 as the statutory provision allegedly violated. Since the complaint alleges that Forbes, Inc., in its corporate capacity made the contribution, the appropriate cite and standard of review should be based upon 2 U.S.C. §441b(b).

cites to the Commission's Advisory Opinion 1990-5 in which Complainant alleges a "similar question" was addressed by the Commission.

Complainant seeks injunctive relief, and a finding of a violation and civil penalties for the alleged violation.

B. STATUS OF PARTIES

The service of this complaint was made upon Respondent in his individual capacity and to the best of Respondent's knowledge and that of Respondent's undersigned legal counsel, no other potential Respondent received service of the Complaint. Therefore, this response is submitted to the Commission on behalf of Respondent, in his individual capacity, and not on behalf of any additional third party entity who may be a potential respondent in the view of the Commission.

C. SUMMARY OF RESPONSE

The Complainant alleges that the mere discussion of issues by Respondent in the "Fact and Comment" section of *Forbes* magazine constitutes an "indirect benefit" to promote Mr. Forbes presidential campaign. The facts demonstrate that not one of the referenced editorial comments by Mr. Forbes mentions his candidacy, nor the candidacy of any other Republican candidate. The discussion of issues was not presented in any fashion relating to his presidential effort or that of his Republican opponents. The courts and the Commission have a long and very definitive position that the discussion of public policy issues in a generic nature, which do not reference a candidate or a candidate's election, do not constitute an attempt to "influence" an election. This position has been underscored most recently in a number of court decisions mandating that the limits and prohibitions of the FECA pertain only to speech which is of an expressed advocacy nature. The editorial comments by Mr. Forbes do not reference his campaign, his candidacy, nor do they come close to the "influence" or "in connection with"

standards, let alone the express advocacy parameters which the courts and the Commission have laid down as the basis of determining the applicability of the FECA.

In addition, the FECA sets out exemptions in the statute pertaining to news stories in publications such as *Forbes* magazine. Further, the Advisory Opinion to which the Complainant cites, AO 1990-5, is distinguishable from the present factual situation. Utilizing the three-pronged criteria in that AO cited by the Complainant, the editorials by Mr. Forbes failed to meet or draw near to those standards.

For these reasons, Respondent submits that the Complainant has failed to state any factual or legal basis for a cause of action which would justify a Reason to Believe finding.

D. STANDARD REVIEW

The Complaint alleges the identified editorials constituted a prohibited corporate contribution and expenditure under the Act. The Complaint cites to 2 U.S.C. §431(8)(A)(1); §431(9)(A)(1) and its corresponding Federal Election Regulations at 11 C.F.R. §100.7(a)(1) and §100.8(a)(1)².

The term "contribution" to which the Complainant references is defined to include, "...any gift, subscription, loan, advance or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office" (§431(8)(A)(i)). The corresponding definition of an expenditure is found at §431(9)(A)(i). The Complaint, however, appears to be alleging that *Forbes* magazine as a corporate entity undertook an activity, allegedly constituting expenditure in violation of §441b. For purposes of that section, the definition of contribution or expenditure is "... any direct or

² See FN 1 supra; also, the fact that this Complaint was served on Respondent, in his individual capacity, raises the threshold issue that an individual could not violate the "corporate contribution" provisions alleged in the Complaint. Similarly, if the allegation that he, in his individual capacity, was making a contribution to his presidential campaign by virtue of the editorials, then there is not an applicable contribution limit (§441a). Since Mr. Forbes did not accept federal matching funds pursuant to the Presidential Primary Matching Payment Account Act 26 U.S.C. §9031, *et cet.*, he was not limited to the amount which he could contribute to his own presidential campaign. The discussion herein pertaining to the corporate contributions prohibition at §441b is therefore submitted to the Commission in a generic discussion of the allegations rather than proffered as an argument to a specifically pled violation.

indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or state bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, ..." (§441b(b)(2)).

The Federal Election Regulations also exempt from the definition of expenditure,

any costs incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, newspaper, magazine, or other periodical publication is not an expenditure, unless the facility is owned or controlled by any political party, political committee, or candidate, in which case the cost for a news story (i) which represents a bona fide use account communicated in a publication of general circulation or on a licensed broadcasting facility, and (ii) which is part of the general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not an expenditure 11 C.F.R. §100.8(b)(2).

The courts, in their attempts to define, "contribution" and "expenditure" pursuant to their respective definitions at §431 and §441b, have consistently and staunchly applied a narrow standard of review and in order to avoid a chilling effect upon one's First Amendment Right to Speech. This standard is one which must explicitly and clearly advocate the election or defeat of a candidate. In Buckley v. Valeo 424 U.S.1 (1976), the court stated that a communication fulfilling the definition of contribution or an expenditure must contain express words of advocacy of election or defeat such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject," id at page 44, n. 52.

In FEC v. Massachusetts Citizens for Life, Inc. (MCFL), 479 U.S. 238 (1986), the court continued to recognize the expressed advocacy standard laid down in Buckley.

"The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve into practical application. Candidates, especially incumbents, are intimately tied to public

issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their position on various issues, but campaigns themselves generate issues of public interest ... Buckley adopted the expressed advocacy requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." at page 249.

In FEC v. Furgatch, 807 F. 2d 857 (9th Cir. 1987), cert. denied, 484 U.S. 850(1987) the court again recognized the express advocacy standard when it stated, "first, even if it is not presented in the clearest, most explicit language, speeches "express" for present purposes, if its messages unmistakable and unambiguous, is suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action and thus speech that is merely informative is not covered by the act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election of defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action." Id at 864.

More recently, in Maine Right to Life Committee, Inc. et al v. Federal Election Commission, (Civil No. 95261-B-H, U.S.D.C., Maine,) the court, expounding upon the Buckley and MCFL line of cases stated,

"In other words, FEC restriction of election activities was not to be permitted to intrude in any way upon the public discussion of issues. What the Supreme Court did was to draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoid restricting, in any way, discussion of public issues. The court seems to have been quite serious in limiting the FEC enforcement to express advocacy, with examples of words that directly fit that term. The advantage of this rigid approach, from a First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited." Page 9.

E. DISCUSSION

1. The text of the "Fact and Comment" column do not advocate any candidate's election.

A review of the editorials from the "Fact and Comment" column in *Forbes* magazine clearly demonstrates from their plain words, that none of the discussion is for purposes of "influencing" or "in connection with" any election or defeat of a candidate, let alone his own candidacy. What is revealed is a classic situation where a public figure continues to voice opinions pertaining to issues of a general nature and of a general interest to the population of the world. The "Fact and Comment" column has been written by Mr. Forbes for over fifteen years and his column is contained in the worldwide distribution of the *Forbes* magazine.

In assessing the language of the editorials, the Commission needs to apply an express advocacy standard, something which the Complainant does not recognize. Rather, Complaint alleges an "indirect benefit" (the definition of which is clearly wanting) standard which reads "election advocacy" into words which on their face express no such message or intent. The express advocacy standard against which the language must be measured to determine whether or not it comes within the ambit of the FECA. There is no doubt, whatsoever, that none of the editorials issued by Mr. Forbes meets the expressed advocacy standard articulated by the courts in many cases, as cited above. The fact that no reference is made to his campaign, or that of any Republican presidential candidate, should in and of itself, be definitive for the Commission to find No Reason to Believe and close the file.

2. Advisory Opinion 1990-5 provides no distinguishing legal support for complainant, and in fact, reconfirms Respondent's positions.

The Complainant also references Advisory Opinion 1990-5 which sets forth a three-prong test to determine whether a newsletter published by a congressional candidate would be considered a contribution or expenditure under the FECA.

The three-prong test articulated in the Advisory Opinion which Complainant references is the following:

(1) Direct or indirect references made to the candidacy, campaign, or qualification for public office of (the candidate) or (the candidate's) opponent;

(2) Articles or editorials are published referring to (the candidate's) views on public policy issues or those (the candidate's) opponent or referring to issues raised in the campaign, whether written by (the candidate) or anyone else; or

(3) Distribution of the newsletter is expanded ... in the manner that indicates utilization of the newsletter for campaign communication. (Advisory Opinion 1990-5).

The Commission in that opinion concluded that a review of each of the newsletters would be required to determine whether or not the content constituted an expenditure for the benefit of this campaign. However, the Complainant fails to draw the Commission's attention to the fact pattern in that Advisory Opinion, which is dramatically different from that involved with *Forbes* magazine. The Commission noted that, the newsletter originated at a time when the individual was a candidate for federal office; it was inspired by his experiences as a candidate for Congress; it was sent out primarily to individuals whom he encountered during his prior campaign, many of whom had been supporters of his candidacy; people involved in the campaign were also involved in the publication of the newsletter. None of those situations are presented in this matter pertaining to Mr. Forbes. Mr. Forbes has been editing this column for over 15 years, a time which was clearly prior to any inkling he may have had for his candidacy for federal office. The magazine is circulated worldwide to hundreds of thousands of people and its genesis was not the outgrowth of campaign-related activities.

The more instructive component of the Advisory Opinion, if it is to be considered by the Commission, is that portion which summarizes the Commission's long-time position on this issue.

The Commission has frequently considered whether particular activities involving the participation of a federal candidate, or communications referring to a federal candidate, result in a contribution to or an expenditure on behalf of such a candidate under the Act. The Commission has determined that financing such activities will result in a contribution or expenditure on behalf of the candidate if the activities involve: (I) the

solicitation, making or acceptance of contribution to the candidate's campaign, or (ii) communications expressly advocating the nomination, election, or defeat of any candidate. (Advisory Opinions 1988-27, 1986-37, 1986-26, 1982-56, 1981-37, 1980-22, 1978-56, 1978-15, 1977-54, and 1977-42.)

(See also Advisory Opinion 1978-72.)

The editorials in question do not directly or indirectly solicit contributions to Mr. Forbes' campaign, and as can be determined from the plain reading of the editorials in question, there are no "communications expressly advocating the nomination, election, or defeat of any candidate."

Based upon Advisory Opinion 1990-5 and the numerous opinions cited therein supporting Respondent's position on this issue, the Complainant has failed to point to any authority to sustain the allegations contained in his complaint.

3. This issue does not reach the applicability of the press exemption at 11 C.F.R. 100.8(b)(2), since Complainant fails to demonstrate any support for the threshold issue that the "Fact and Comment" column constitutes an expenditure.

The failure of Complainant to provide a factual or legal basis to support a finding that the "Fact and Comment" column constitutes an expenditure, makes a discussion of the §100.8(b)(2) press exemption a moot issue. That exemption is applicable only after an initial determination is made that the text of the news article advocates the election or defeat of a candidate. The rational being, that but for the press exemption, the publisher would be found to have made a contribution or expenditure.

In this matter, that threshold argument falls since the text of the *Forbes* columns do not meet the statutory definition of contribution or expenditure. Absent that, we need not address the applicability of the exemption.

Conclusion

From the clear reading of the Act, the standards established by the Supreme Court and re-affirmed in numerous lower court holdings, and the long line of Advisory Opinions issued by the Commission, Respondent submits that Complainant has failed to allege any fact pattern which remotely constitutes a possible violation of the Act. Based upon the facts submitted and the clear direction of the law in the matter, Respondent requests that the Commission make a finding of No Reason to Believe and close out this matter.

Respectfully submitted,

A handwritten signature in cursive script that reads "Paul E. Sullivan". Below the signature, the initials "(LP)" are written in a smaller, handwritten font.

Paul E. Sullivan, Esq.
Counsel for Respondent

Enclosures

cc: Chairman Elliott
Vice-Chairman McGarry
Commissioner Aikens
Commissioner McDonald
Commissioner Thomas

STATEMENT OF DESIGNATION OF COUNSEL

MUR 4305

NAME OF COUNSEL: Paul E. Sullivan

FIRM: _____

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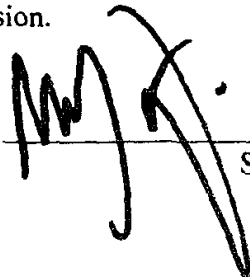
San Jose, CA 95126

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The above-named individual is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

3/15/96
Date


Signature

RESPONDENT'S NAME: Malcolm S. Forbes, Jr.

ADDRESS: c/o 1400 Route 26 North

Bedminster, NJ 07921

TELEPHONE: HOME 

BUSINESS (908) 781-6001